

Mailing Date: July 22, 2010

PENNSYLVANIA LIQUOR CONTROL BOARD  
HARRISBURG, PA 17124-0001

PENNSYLVANIA STATE POLICE,	:	Citation No. 09-2013
BUREAU OF LIQUOR CONTROL	:	
ENFORCEMENT	:	
	:	
v.	:	
	:	
THE MINES, INC.	:	License No. R-5618
101-105 North Main Street Lower Level	:	
P.O. Box 2	:	LID 60630
Wilkes-Barre, PA 18703-0002	:	

Licensee: Thom Greco, Pro Se (on appeal)

Counsel for Licensee: Donald G. Karpowich, Esquire (below)  
85 Drasher Road  
Drums, PA 18222

Counsel for Bureau: Craig A. Strong, Esquire  
Pennsylvania State Police,  
Bureau of Liquor Control Enforcement  
7448 Industrial Park Way  
Macungie, PA 18062

**OPINION**

The Mines, Inc. (“Licensee”) appeals from the Adjudication and Order of Administrative Law Judge Felix Thau (“ALJ”), wherein the ALJ sustained Citation No. 09-2013, imposed a fine in the amount of one thousand two

hundred and fifty dollars (\$1,250.00) and ordered RAMP compliance within ninety (90) days of the mailing date of the Adjudication. Contemporaneous with its present appeal, Licensee filed an Application for Supersedeas.

The citation in the present matter contained one (1) count that charged Licensee with violation of section 493(1) of the Liquor Code [47 P.S. § 4-493(1)], and alleged that on April 26, 2009, Licensee, by its servants, agents or employes, sold, furnished and/or gave or permitted such sale, furnishing or giving of alcoholic beverages to one (1) visibly intoxicated male patron.

Pursuant to section 471 of the Liquor Code [47 P.S. § 4-471], the appeal in this case must be based solely on the record before the ALJ. The Board shall only reverse the decision of the ALJ if the ALJ committed an error of law or abused his/her discretion, or if his/her decision was not based upon substantial evidence. The Commonwealth Court defined "substantial evidence" to be such relevant evidence as a reasonable person might accept as adequate to support a conclusion. Joy Global, Inc. v. Workers' Compensation Appeal Bd. (Hogue), 876 A.2d 1098 (Pa. Cmwlth. 2005); Chapman v. Pennsylvania Bd. of Probation and Parole, 86 Pa. Cmwlth. 49, 484 A.2d 413 (1984).

Licensee's appeal asserts two (2) related claims: first, that the ALJ abused his discretion; and secondly, that the ALJ's findings of fact and conclusions of law are not supported by substantial evidence. The Board has reviewed the certified record, including the Notes of Testimony from the hearing held on February 18, 2010, as well as the ALJ's Adjudication and Order, with Licensee's contentions in mind, and has concluded that the ALJ's ruling is without error and is supported by substantial evidence. Accordingly, we affirm.

Licensee's primary argument is that the ALJ verbally abused Licensee throughout the proceedings and that this courtroom decorum affected the outcome of the case. Licensee submits that this alleged judicial misconduct constitutes an abuse of discretion. It should be noted that Licensee fails to cite to any specific portion of the record in support of its position that the ALJ's behavior was inappropriate or abusive.<sup>1</sup> While the Board does not condone or approve of the ALJ's behavior, statements or decorum in this matter, Licensee's appeal must nonetheless fail.

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<sup>1</sup> The Board has reviewed the record and is disheartened by several exchanges between the ALJ and Licensee. The ALJ is reminded that Article I and the Pennsylvania Code of Civility provide that a judge should "show respect, courtesy and patience to the lawyers, parties and all participants in the legal process by treating them all with civility." Further, a judge "should not employ hostile or demeaning words in opinions or in written or oral communications with lawyers, parties and witnesses." Pa. Code of Civility, Art. I, 42 Pa.C.S.A.

The exercise of judicial discretion requires action in conformity with law, upon fact and circumstances judicially before the court, after hearing and due consideration. It is well-settled that an abuse of discretion is not merely an error of judgment; however, if in reaching a conclusion the law is overridden or misapplied or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence or the record, discretion is abused. Commonwealth v. Levanduski, 907 A.2d 3, 13-14 (Pa. Super. 2006)(*en banc*); Tucker v. Bensalem Township School Dist., 987 A.2d 198 (Pa. Cmwlth. 2009). Abuse of discretion is a highly deferential standard. Rutkowski v. Com., Dept. of Transportation, Bureau of Driver Licensing, 987 A.2d 841 (Pa. Cmwlth. 2009). Ultimately, if the record of the proceeding supports the ALJ's reasons and factual basis, no abuse of discretion can be found to have occurred. Com. ex rel. Corbett v. Snyder, 977 A.2d 28 (Pa. Cmwlth. 2009). As will be discussed *infra*, the record in the present matter supports the ALJ's reasoning and conclusions.

Licensee further alleges that insufficient evidence was presented to support the ALJ's findings of fact and conclusions of law. The burden of proof in a citation proceeding involving a violation of the Liquor Code is upon the

Bureau to prove its case by a clear preponderance of the evidence. Omicron Enterprises, 449 A.2d 857 (Pa. Cmwlth. 1982). As both of Licensee's assertions in this appeal turn on the sufficiency of the evidence produced at the hearing and relied upon by the ALJ, an examination of the record is required.

Review of the transcript in this matter reveals that Bureau Enforcement Officer Michael Rutkowski entered the licensed premises on April 25, 2009, at approximately 11:45 p.m., as part of an ongoing investigation. [N.T. 12-14, 16]. Officer Rutkowski was wearing plain clothes and working in an undercover capacity. [N.T. 17]. The establishment was open and operating at the time of the officer's entry and was providing service to approximately eight (8) patrons. [N.T. 18-19]. At the time of Officer Rutkowski's entrance, a disturbance was taking place immediately outside the establishment. [N.T. 16]. The Wilkes-Barre Police Department was placing individuals under arrest for their involvement in a fight outside of the establishment. [N.T. 17].

Upon entry, Officer Rutkowski made his way to the upstairs serving area where he observed a younger, blonde female working behind the bar. [N.T. 19]. Officer Rutkowski sat at the bar and immediately noticed a customer who appeared in his experience to be visibly intoxicated. [N.T. 19]. The

customer was with two (2) other patrons watching an ice hockey game on television. [N.T. 20]. All three (3) patrons were seated approximately four (4) to five (5) feet away from the officer, also seated at the bar. [N.T. 20]. Officer Rutkowski's attention was drawn to the group when the officer overheard someone state "shut up, you drunk," directed to the customer that the officer believed to be intoxicated. [N.T. 20-21].

Officer Rutkowski personally observed the customer consume (2) mixed drinks that had been sitting in front of the customer when the officer arrived. [N.T. 21-22]. Each of the customer's companions drank one (1) mixed drink. [N.T. 21]. In response to the "shut up, you drunk" statement, the customer hoisted his glass and stated "that's fucking right; I'm gonna get bombed tonight." [N.T. 21]. Officer Rutkowski observed that the customer repeatedly screamed profanity, that his general speech was loud, excited and extremely slurred. [N.T. 21]. While watching the game, the customer was extremely impassioned and jumped up and down, almost falling once or twice on his feet. [N.T. 21]. Officer Rutkowski heard the customer repeatedly speak the phrase "That's motherfucking right." [N.T. 21]. The customer also made several

unsolicited comments to various people in the premises that he [the customer] was going to get “bombed” in celebration of his team’s winning. [N.T. 21-22].

Officer Rutkowski overheard the customer’s friends encouraging him to slow down approximately three (3) to four (4) times in the first ten (10) minutes that the officer was present. [N.T. 22-23]. The customer’s friends made this statement after watching the customer consume the two (2) mixed drinks in such a rapid fashion. [N.T. 22-23]. At some point, a member of the bar staff approached the customer and stated that he had “better calm down, especially when [he] leaves because [he is] going to get arrested for being drunk...” [N.T. 22-23].

A short time later, Officer Rutkowski observed both of the customer’s friends encouraging him to leave; however, the customer insisted on staying, and stated that he wanted another drink. [N.T. 23]. The customer then ordered a rum and coke, which the bartender immediately poured and provided to the customer without charge. [N.T. 23]. The customer drank the beverage rapidly and left the establishment. [N.T. 23]. Officer Rutkowski followed the customer to make sure that he was not driving in his condition. [N.T. 23].

Intoxication is a matter of common knowledge, and opinions given by lay people are permissible on the issue. Commonwealth v. Reynolds, 389 A.2d 1113 (Pa. Super. 1978). A witness may express an opinion regarding another's intoxication so long as sufficient facts exist on which to base an opinion. Commonwealth v. Hughes, 480 Pa. 311, 389 A.2d 1081 (1978). See also Commonwealth v. Summers, 410 A.2d 336 (Pa. Super. 1979) (concluding that witnesses' observations of the way the person looked and the way he was walking provided sufficient factual basis for witness to conclude a person was intoxicated). The court also looks to the witness' personal knowledge and observation. Commonwealth v. Davenport, 386 A.2d 543 (1978).

Given the evidence presented, the Board finds that the Bureau has met its burden of proof by a clear preponderance of the evidence. Testimony presented by Officer Rutkowski established that the customer was visibly intoxicated at the time he was served an alcoholic beverage. While both cross-examination of the Bureau's witness and testimony presented by Licensee disputed the Bureau's version of events, Licensee's challenge ultimately amounts to nothing more than dissatisfaction with how the ALJ accorded evidentiary weight. Licensee invites the Board to engage in a reevaluation of

witness credibility on a cold record. Such an invitation has been previously rejected by the Commonwealth Court, and is similarly rejected by the Board in regard to this case. See Thorpe v. Public Sch. Employee's Ret. Bd., 879 A.2d 341 (Pa. Cmwlth. 2005); Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Goodfellas, Inc., 850 A.2d 868 (Pa. Cmwlth. 2004). It is well-settled that matters of witness credibility are the sole prerogative of the ALJ, and the ALJ's findings on credibility will not be disturbed absent a showing of insufficient evidence. Borough of Ridgway v. Pennsylvania Public Utility Comm'n, 83 Pa. Cmwlth. 379, 480 A.2d 1253 (1984).

In the instant case, the ALJ found the testimony of the Enforcement Officer to be credible and adequate to support the charge in the citation. The ALJ fully articulated the factors presented through testimony that established the customer was visibly intoxicated at the time he was served an alcoholic beverage by Licensee. The Board will not overturn the ALJ's opinion on nothing more than mere speculation and a suggestion that the officer was not credible. As a result, the Board rejects Licensee's assertion concerning sufficiency of the evidence.

Because the adjudication in this matter is supported by the record, the Board finds that the ALJ's decision was not an abuse of discretion and was based upon substantial evidence and shall not be disturbed. Accordingly, the decision of the ALJ is affirmed.<sup>2</sup>

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<sup>2</sup> Having paid the fine on May 26, 2010, the Licensee's request for supersedeas is moot.

**ORDER**

The decision of the ALJ in regard to Citation 09-2013 is affirmed.

The appeal of Licensee is denied.

The fine of one thousand two hundred-fifty dollars (\$1,250.00) has been paid.

Licensee must adhere to all other conditions set forth in the ALJ's Order mailed April 12, 2010.

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Board Secretary